84-197 (2)

Office - Supreme Court, U.
FILED
AUG 8 1984
ALEXANDER L. STEVAS
CLERK

No._____

SUPREME COURT OF THE UNITED STATES

October Term, 1984

ROBERT B. SUTTON,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

ON APPLICATION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

MITCHELL B. LANSDEN
Attorney for Appellant
536 Louisiana Ave.
Baton Rouge, Louisiana 70802
Telephone (504) 387-6973

E. BARTON CONRADI
Attorney for Appellant
536 Louisiana Ave.
Baton Rouge, Louisiana 70802
Telephone (504) 387-5393

45 pp

No._____

SUPREME COURT OF THE UNITED STATES

October Term, 1984

ROBERT B. SUTTON,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

ON APPLICATION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

MITCHELL B. LANSDEN
Attorney for Appellant
536 Louisiana Ave.
Baton Rouge, Louisiana 70802
Telephone (504) 387-6973

E. BARTON CONRADI
Attorney for Appellant
536 Louisiana Ave.
Baton Rouge, Louisiana 70802
Telephone (504) 387-5393

INDEX TO APPENDIX

Page

APPENDIX A

Decision of the Tenth Circuit Court of Appeal 1a

APPENDIX B

Per Curiam of Court of Appeals Denying Rehearing 19a

APPENDIX C — PART I

Excerpts from February 1, 1980 Conversation Between Marcello and his Attorney, Barry Mouton 20a

APPENDIX C — PART II

Excerpts from Marcello, Noland Williams Conversation of February 1, 1980 ..... 24a

APPENDIX C — PART III

Excerpts from Agent Zeringue's Pre-Trial Testimony relating to Government Exhibit 18, Introduced at the April 1-16 Pre-Trial Motion Hearing. There was no transcript made of Government Exhibit 18 ..... 40a

APPENDIX A

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	No. 82-1841
v.	)	
	)	
ROBERT B. SUTTON,	)	
	)	
Defendant-Appellant.	)	

Appeal from the United States District Court
For the Northern District of Oklahoma
(D. C. No. 81-CR-97-E)

Mitchell B. Lansden, Baton Rouge, Louisiana (W. Rodney DeVilliers, Sr. of DeVilliers & DeVilliers, Oklahoma City, Oklahoma, with him on the brief), for Defendant-Appellant.

William J. Hardy, Attorney, (Frank Keating, United States Attorney, Tulsa, Oklahoma, and Richard A. Sauber, Attorney, Department of Justice, Criminal Division, Washington, D.C., with him on the brief) Department of Justice, Criminal Division, Washington, D.C., for Plaintiff-Appellee.

Before BARRETT and LOGAN, Circuit Judges, and CHILSON, District Judge*

LOGAN, Circuit Judge.

---

* Honorable Hatfied Chilson, Senior United States District Judge for the District of Colorado, sitting by designation.

Defendant Robert B. Sutton appeals his conviction on one count of obstruction of justice, a violation of 18 U.S.C. § 1505, and one count of conspiracy to obstruct justice, a violation of 18 U.S.C. § 371. Those were the last two counts of a seventeen-count indictment. The first fifteen counts alleged racketeering, mail fraud, and wire fraud and were based on allegations that defendant falsely certified and sold crude oil in violation of federal regulations setting ceiling prices for various categories of crude oil. Two corporations wholly-owned by defendant, BPM, Ltd., and Scurry Oil Company, were also named in the first fifteen counts.

After the government rested its case against the defendants, the trial court found that the government had not met its burden of proof on counts one through fifteen and accordingly entered judgments of acquittal on those counts. The government sought immediate review of the trial court's order in this Court. A panel of this Court reversed that order and directed the trial court to submit all seventeen counts to the jury. *United States v. Ellison*, 684 F.2d 664 (10th Cir. 1982). This Court then heard argument en banc and reversed the panel decision. *United States v. Ellison*, 722 F.2d 595 (10th Cir. 1982). After the Supreme Court denied a stay pending resolution of the government's petitions for mandamus and certiorari, the trial resumed. The jury then found defendant guilty on count seventeen, conspiracy to obstruct justice, but could not reach a verdict on count sixteen, obstruction of justice. The trial court declared a mistrial on the obstruction of justice count, and a few weeks later defendant was retried and convicted. The trial court then sentenced defendant to five years in prison on each count, with the sentences to run concurrently, and assessed fines on each count.

The government contended that defendant obstructed justice by advising Gaylord Simon, a BPM employee, to destroy certain records that the Department of Energy (DOE)

had directed defendant, as president of BPM, to produce. Michael Bloese, formerly an auditor for the DOE, testified that he served an administrative subpoena at the office of BPM on June 30, 1978, directing defendant to produce certain records, including purchase and sales invoices, so that the DOE could conduct an audit of BPM. The subpoena was introduced into evidence. Charles Wooten, an attorney for defendant, testified that he hired an accountant, William Johnson, in July 1978 to analyze certain BPM purchase and sales invoices and that Johnson took several boxes of BPM records to his office in Lafayette, Louisiana. Dennis Briggs, an employee of one of defendant's companies and defendant's brother-in-law, testified that Simon sent him to pick up the records from Johnson and that he picked up all but one of the boxes and moved them to an ice house in Crowley, Louisiana. Briggs testified that when he told defendant that Johnson still had one box, defendant became upset. Soon after Briggs moved the boxes, vandals destroyed all the records in the ice house.

Gaylord Simon testified that another BPM employee instructed him to pick up the box of records at Johnson's house. Simon did so and then went to LaFonda's Restaurant and called defendant. Simon testified that defendant told him to destroy the records, and that defendant said he would never mention the box again. The government introduced telephone company records to corroborate Simon's testimony, showing that a call was made to the office of Paul McBride, another of defendant's attorneys, from LaFonda's. Simon testified that he disobeyed defendant's instructions and kept the box. Later he gave the box to Jack Clothier, a former business associate of defendant.

Richard Fishkin, a Justice Department lawyer, testified that Paul Wolff, another of defendant's attorneys, wrote him in January 1980 that Jack Clothier and his attorney, William Lambert, might have documents that were the subject of the

subpoena served on BPM. Ellis Blount, an FBI agent, testified that William Lambert surrendered a box of records in response to a subpoena ordering Lambert to turn over any BPM records in his possession. Blount identified a box as the one Lambert had given him. That box was admitted into evidence. Another FBI agent, David Brechwald, testified that he examined the contents of the box and found that it contained BPM invoices from late 1976 to early 1978.

To prove count seventeen, the conspiracy count, the government introduced tapes of conversations between defendant and Carlos Marcello. In addition, the government introduced evidence of unrecorded meetings between defendant and Marcello. The tapes reveal that defendant told Marcello he wanted Marcello to prevent Lambert and Clothier from talking to the FBI. The jury's guilty verdict necessarily represented a finding that Marcello agreed to defendant's request.

At the second trial the government introduced substantially the same evidence to prove obstruction of justice as at the first trial. To prove motive, the government offered testimony that defendant had bought oil for which there was a ceiling price and sold it as oil for which there was no ceiling price. The jury convicted defendant on this count at the second trial.

On appeal defendant challenges the validity of the indictment against him, argues that the trial court should have granted his motion to sever, and contends that after the trial court entered judgment on the first fifteen counts of the indictment, the government was collaterally estopped from proceeding against him on the remaining counts. Defendant also contends in regard to the first trial: (1) that the court erroneously admitted statements of Carlos Marcello; (2) that parts of tape-recorded conversations played at trial were prejudicial; (3) that the Court erred in not allow-

ing defendant to question a witness about charges pending against her; (4) that the court should not have admitted the box of records; (5) that the evidence was insufficient to support a conviction on the obstruction of justice count; (6) that the evidence was insufficient to support the conviction for conspiracy; (7) that the court should have granted a mistrial after it entered judgments of acquittal on the first fifteen counts; and (8) that the court erred in instructing the jury that there were no missing witnesses in the case.

In regard to the second trial defendant contends: (1) that the court abused its discretion in its conduct of voir dire; (2) that the court erred in not allowing defendant to inform the jury of his acquittal on the first fifteen counts of the original indictment; (3) that the court erroneously admitted testimony by Gaylord Simon's wife; (4) that the court erroneously admitted testimony by defendant's former lawyer; (5) that the court did not properly question the jurors about possible prejudicial publicity and contact with third parties; (6) that there was insufficient evidence of obstruction of justice to support the conviction; and (7) that the trial court improperly instructed the jury on the credibility of witnesses.

I

Defendant argues that the trial court should have dismissed the indictment in this case because the government failed to present to the grand jury exculpatory evidence relevant to the conspiracy count. Defendant argues that comments Marcello made during various tape-recorded conversations tended to prove that Marcello did not intend to conspire with defendant. The jury heard some of the evidence defendant claims was exculpatory but convicted him on the conspiracy count nonetheless. Even assuming that Marcello's comments were exculpatory, defendant's argument has no merit. This Court considered a similar claim in *United States v. Gutierrez*,

696 F.2d 753 (10th Cir. 1982), *cert. denied*, ____ U.S. ____, 103 S.Ct. 1884 (1983). In that case we wrote:

> "Ordinarily . . . an indictment is not subject to challenge on the ground of incompetent evidence. *See Costello v. United States*, 350 U.S. 359, 363, 76 S.Ct. 406, 408, 100 L.Ed. 397 (1956). And thus, 'an indictment returned by a legally constituted and unbiased grand jury, valid on its face is sufficient to call for trial of the charge on the merits.' *United States v. Hubbard*, 603 F.2d 137, 141 (10th Cir. 1979)."

Id. at 754-55.

Defendant does not claim that the indictment in this case is facially invalid. We reject defendant's challenge to the indictment.

II

Before trial defendant moved for a severance of counts sixteen and seventeen. Because all the counts grew out of the same scheme, joinder was proper under Fed. R. Crim. P. 8(a). Defendant argued that evidence on counts sixteen and seventeen would unfairly prejudice the jury against him on the first fifteen counts. Since the trial court entered judgments of acquittal on the first fifteen counts, there was no harm to defendant on those counts. We find no abuse of discretion in the trial court's refusal to sever.

III

Defendant argues that because the trial court entered judgments of acquittal on the first fifteen counts of the original indictment, the government was estopped from proceeding against him on the remaining counts. Defendant cites *Ashe v. Swenson*, 397 U.S. 436 (1970), for the proposition that when a valid and final judgment determines an issue of ultimate fact in a criminal case, the Double Jeopardy Clause bars relitiga-

tion of that ultimate fact. The rule of *Ashe* is inapplicable here. The elements of obstruction of justice and conspiracy to obstruct justice are different from the elements of the crimes of which defendant was acquitted. Thus, defendant's acquittal on the racketeering, mail fraud, and wire fraud counts determined no issue of ultimate fact that was necessary to a conviction on either of the remaining counts.

IV

Defendant claims that the trial court improperly admitted statements of Carlos Marcello against defendant as statements by a co-conspirator in furtherance of a conspiracy because there was not substantial evidence independent of those statements to establish the existence of a conspiracy. *See United States v. Stipe*, 653 F.2d 446 (10th Cir. 1981). The trial court held a pre-trial hearing at which it correctly determined that there was substantial independent evidence of a conspiracy. Defendant's own statements on tape that he wanted Marcello to prevent Lambert and Clothier from going to the FBI were not hearsay. Fed. R. Evid. 801(d)(2)(A). Those statements and Marcello's statements implicitly agreeing to comply with defendant's request constituted substantial independent evidence of a conspiracy between defendant and Marcello. Thus, other statements by Marcello in furtherance of the conspiracy were admissible without a limiting instruction. Fed. R. Evid. 801(d)(2)(E).

V

Defendant claims that the court erred in allowing the government to play part of a tape recording of a conversation between defendant and Carlos Marcello in which defendant told Marcello that defendant's lawyer thought he was guilty and advised him to plea bargain. The conversation tended to prove motive and consciousness of guilt; evidence of both is admissible. *See United States v. Smith*, 629 F.2d 650, 652 (10th

Cir.), *cert. denied*, 449 U.S. 994 (1980); *United States v. Rowe*, 565 F.2d 635, 638 (10th Cir. 1977).

VI

Defendant claims that the trial court denied him his right to confront the witnesses against him by refusing to permit his counsel to question a witness, Jean Brown, about theft charges pending against her in Texas. Defendant argues that he needed to inquire about those charges to show bias, citing *Davis v. Alaska*, 415 U.S. 308, 317 (1974). The trial court gave defense counsel great latitude in questioning Brown about her involvement in illegal activities and about any special treatment she might expect to receive because of her testimony. Defendant asserts that Brown testified before the grand jury that she blamed defendant for the charges pending against her in Texas, and that therefore it was necessary for defense counsel to ask her about those charges specifically. In the portion of Brown's grand jury testimony that defense counsel read to the judge, Brown denied the allegations against her but did not blame Sutton for the charges. The trial court did not abuse its discretion when it disallowed questioning about the charges pending against Brown.

VII

Defendant argues that the court erred in admitting Exhibit 53, the box that William Lambert gave Agent Blount in response to a subpoena to turn over any records of BPM and several other companies in his possession. Defendant claims that the box was not properly authenticated. Fed. R. Evid. 901(a) provides:

> "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."

The government introduced Exhibit 53 simply as the box that William Lambert gave Agent Blount, and Agent Blount identified the box. The prosecution asked the jury to infer that Exhibit 53 was the same box of BPM records that Jean Brown had compiled and the same box of records that defendant had directed Gaylord Simon to destroy. The inference was a reasonable one in light of all the evidence. We find no error.

VIII

Defendant argues that the government produced insufficient evidence at the first trial to support a conviction for obstruction of justice, and that the trial court should have entered a judgment of acquittal rather than mistrial on that count. We must view the evidence and all reasonable inferences from the evidence in the light most favorable to the government. *United States v. Goldstein*, 695 F.2d 1223, 1235 (10th Cir. 1981), *cert. denied*, ____ U.S. ____, 103 S.Ct. 3112 (1983). First, defendant argues that the government introduced insufficient evidence to prove, as it must under 18 U.S.C. § 1505, that a proceeding of a department or agency of the United States was pending at the time of the alleged obstruction. Michael Bloese, formerly an auditor for the United States Department of Energy, testified that he had served a subpoena on a BPM employee that directed defendant, as president of BPM, to produce certain records so that the DOE could conduct an audit of BPM. Agency investigative activities are "proceedings" within the meaning of § 1505. *United States v. Browning, Inc.*, 572 F.2d 720, 723 (10th Cir.), *cert. denied*, 439 U.S. 822 (1978). Defendant argues that there was no "proceeding" pending because the time for compliance with the subpoena had passed by the time of the alleged obstruction. We disagree. It would be absurd to conclude that someone could end a "proceeding" simply by failing to timely comply with a subpoena.

Second, defendant argues that the government did not prove that he knew about the proceeding. Again, we disagree. The jury could have reasonably inferred from the service of the subpoena at BPM's office and from the evidence of defendant's subsequent behavior that defendant knew about the DOE audit.

Third, defendant argues that there was insufficient proof that what defendant allegedly asked Simon to destroy were BPM records and thus the subject of the subpoena. Simon testified that he gave a box of records to Clothier. A letter written by one of defendant's attorneys stated that Lambert and Clothier had records sought by the BPM subpoena. This is sufficient evidence that the records defendant directed Simon to destroy were BPM records.

IX

Defendant claims that the government produced insufficient evidence of Carlos Marcello's intent to accomplish an illegal objective to support defendant's conviction for conspiracy to obstruct justice. In evaluating defendant's contention we must view the evidence in the light most favorable to the government and determine whether the evidence is sufficient to justify a verdict of guilt beyond a reasonable doubt. *United States v. Goldstein*, 695 F.2d at 1235.

When defendant told Marcello that he wanted Marcello to prevent William Lambert and Jack Clothier from talking to the FBI, Marcello implied that he agreed to do so. For example, he told defendant to give him addresses so he would not get the wrong people. When defendant offered to send someone to help Marcello, Marcello refused the offer and said, "Just give me them two and you handle your other one." Later Marcello called his lawyer to get information about Lambert and Clothier. Defendant relies on two taped conversations to argue that the evidence creates a reasonable doubt that Marcello

intended to do defendant's bidding. The jury heard the Marcello-Noland-Williams conversation and obviously did not consider it sufficiently exculpatory to create a reasonable doubt on guilt. The other, between Marcello and his lawyer, was not introduced into evidence. The excerpts from that conversation available to us are insufficient to show that Marcello was insincere when he agreed to comply with defendant's request. Viewed in the light most favorable to the government, the evidence is sufficient to support the jury's finding that Marcello intended, at least for a time, to accomplish defendant's proposed objective.

X

Defendant argues that the trial court erred in refusing to grant a mistrial on the remaining counts after the court entered judgments of acquittal on the first fifteen counts of the original indictment. Because the jurors had heard evidence relevant to the first fifteen counts, defendant argues, they could not fairly consider the remaining counts.

Although a trial court should be sensitive to the possibility of prejudice under such circumstances, *cf. Schaffer v. United States*, 362 U.S. 511, 516 (1960) (joinder of defendants rather than counts), the trial court did not abuse its discretion by refusing to grant a mistrial. The court instructed the jurors that they were to consider only the remaining two counts in the indictment. The evidence on the conspiracy count and the obstruction count was distinct from the other evidence presented, and the judge explained to the jurors what facts they must find to convict defendant on those counts.

Defendant also argues that the trial court should have granted a mistrial because the evidence became stale during the twelve days between entry of acquittal on the first fifteen counts and resumption of the trial. This is a matter of judgment, but we note that often in complex cases there are sub-

stantial lapses between the time the jury hears particular evidence and the time it commences deliberation. We hold that the trial court did not abuse its discretion in refusing to grant a mistrial after a twelve-day delay.

Finally, defendant argues that, at the very least, the trial court should have informed the jury that defendant had been acquitted on the first fifteen counts of the original indictment. The trial court instructed the jury that the first fifteen counts had been "otherwise disposed of" and that they were to consider only the remaining counts. We find no abuse of discretion.

> "A judgment of acquittal is relevant to the legal question of whether the prosecution is barred by the constitutional doctrine of double jeopardy or of collateral estoppel. But once it is determined that these pleas in bar have been rejected, a judgment of acquittal is not usually admissible to rebut inferences that may be drawn from the evidence that was admitted. Not only does the inference appellants suggest not flow from the judgment of acquittal . . . , but also a judgment of acquittal is hearsay. The Federal Rules of Evidence except from the operation of the hearsay rule only judgments of conviction, Rule 803(22), not judgments of acquittal."

United States v. Viserto, 596 F.2d 531, 537 (2d Cir.), *cert. denied,* 444 U.S. 841 (1979).

XI

Defendant argues that he was denied the right to confront the witnesses against him because the trial court gave a missing witness instruction but then instructed the jury that there were no missing witnesses in this case. Defendant also complains because the prosecution was allowed to tell the jury that defendant could have called any "missing witnesses" to the stand.

A trial court has discretion to give or refuse to give a missing witness instruction. *United States v. Montoya*, 676 F.2d 428, 431 (10th Cir. 1982), *cert. denied*, ____ U.S. ____, 103 S.Ct. 121 (1933). Before jury argument in this case the court announced that it would give a general missing witness instruction. However, the court warned defense counsel that any reference to missing witnesses would open the door for the government to explain that the defendant had subpoena power and could have called the witnesses himself. This was, in effect, a ruling that there were no missing witnesses in the case. Defense counsel did argue to the jury that the government had failed to call certain witnesses; the government responded by informing the jury that the defendant could have subpoenaed the witnesses. After jury argument the trial court agreed to append to the missing witness instruction the statement that there were no missing witnesses in this case.

The trial court did not abuse its discretion in concluding that there were no missing witnesses. The defense did not adequately show that it was solely within the government's power to physically produce the witnesses or that the witnesses' relationship with the government was such that the witnesses were effectively unavailable to the defense. *See United States v. Montoya*, 676 F.2d at 430-31; *United States v. Mahone*, 537, F.2d 922, 926-27 (7th Cir.), *cert. denied*, 429 U.S. 1025 (1976); *United States v. Blakemore*, 489 F.2d 193, 195-96 (6th Cir. 1973). Since the trial judge determined that there were no missing witnesses in this case, it would have been wiser for the trial court not to have given any missing witness instruction. But the trial court did not abuse its discretion, particularly since defense counsel referred to missing witnesses in closing argument after the court had warned that such argument would open the door to response by the government. Also, the issue of missing witnesses arose in regard to count sixteen, on which the jury hung. Thus, any error would have been harmless.

XII

Defendant's first claim in regard to the second trial is that the court abused its discretion in conducting voir dire of prospective jurors. Defendant argues that the voir dire impaired his right to exercise his peremptory challenges and denied him due process of law. He bases his claims on the court's dismissal of seventeen jurors who had substantial knowledge of previous proceedings against defendant.

At the time of voir dire the court was holding the defendant's motion for a change of venue in abeyance until it could determine the feasibility of impaneling an impartial jury. Defendant had asserted that prejudicial publicity necessitated a change of venue. Consequently, the judge was particularly sensitive to prospective jurors' knowledge of the case. The judge excused any prospective juror who demonstrated more than slight knowledge of prior proceedings in the case in an attempt to select a jury fair to both sides. Defense counsel acknowledged during voir dire that a prospective juror's knowledge can "cut both ways." One of the dismissed jurors commented. "[A]s far as I'm concerned he [defendant] is sitting over there a multi-millionaire while I'm down here losing money." Another said she knew that the defendant had previously "got off with" a number of counts. Several times defense counsel expressly agreed with the judge's decision to excuse prospective jurors with knowledge, and in many other instances defense counsel remained silent. The jurors with knowledge of the case who were not excused generally had only vague knowledge. Those with more substantial knowledge convinced the judge of their ability to be impartial.

The conduct of voir dire is within the sound discretion of the trial judge. *Ristaino v. Ross*, 424 U.S. 589, 594 (1976). "This is so because the 'determination of impartiality, in which demeanor plays such an important part, is particularly within

the province of the trial judge.' *Rideau v. Louisiana*, 373 U.S. 723, 733 (1963) (Clark, J., dissenting)." *Ristaino v. Ross*, 424 U.S. at 594-95. The government has as much right to an impartial jury as the defendant. *Hayes v. Missouri*, 120 U.S. 68, 70 (1887). The trial court in the instant case acted reasonably in attempting to impanel an impartial jury.

XIII

Defendant argues that the trial court erred in allowing the government to introduce evidence of the crimes of which defendant was acquitted at his first trial. "Evidence of another crime, otherwise competent, is not necessarily rendered inadmissible by the fact that the accused was acquitted of such charge." *United States v. Van Cleave*, 599 F.2d 954, 957 (10th Cir. 1979). Evidence that defendant falsely certified crude oil logically tended to show defendant's motive and intent to obstruct justice.

Defendant also argues that he should have been able to introduce evidence of his acquittal on the fraud counts since the government introduced evidence of fraud.

> "Although a judgment of acquittal is relevant with respect to the issues of double jeopardy and collateral estoppel, 'once it is determined that these pleas in bar have been rejected, a judgment of acquittal is not usually admissible to rebut inferences that may be drawn from the evidence that was admitted.' *United States v. Viserto*, 596 F.2d 531, 537 (2d Cir. 1979)."

United States v. Kerley, 643 F.2d 299, 300 (5th Cir. 1981).

Also, as noted above, a judgment of acquittal is hearsay, and there is no exception to the hearsay rule for judgments of acquittal. *United States v. Viserto*, 596 F.2d at 537. *But cf.* Fed. R. Evid. 803(22) (excepting judgments of conviction from the hearsay rule).

XIV

Defendant contends that the trial court erred in allowing Gaylord Simon's wife to corroborate her husband's testimony that her husband made a phone call from LaFonda's Restaurant in Lafayette, Louisiana, and then told her that defendant had instructed him to destroy some records.

Under Fed. R. Evid. 801(d)(1)(B) evidence of a prior consistent statement by a witness is not hearsay if it is offered to rebut an express or implied charge against the witness of recent fabrication. The trial court must determine whether a statement is offered for that purpose. *United States v. Herring*, 582 F.2d 535, 541 (10th Cir. 1978). At trial defense counsel attempted to show that Mr. Simon was involved in a scheme to blackmail defendant with threats of turning over a box of records to law enforcement officers. On cross-examination defense counsel asked Mr. Simon, "Who was the first person you ever told that you called Bob Sutton at Paul McBride's office at noon on December 19, 1978?" The trial judge, who could see and hear defense counsel's cross-examination of Mr. Simon, reasonably concluded that defense counsel was trying to create the impression that no conversation between Mr. Simon and defendant ever took place and that Mr. Simon recently had fabricated his testimony. The trial judge instructed the jury that Mrs. Simon's statement was not admitted to prove what defendant said. The trial court properly admitted Mrs. Simon's testimony.

XV

Defendant argues that the admission of testimony by defendant's former attorney, Paul McBride, violated the attorney-client privilege. After hearing McBride's proposed testimony outside the presence of the jury, the trial judge excluded testimony about some conversations between defendant and McBride, but permitted McBride to testify that defendant had

said that he was smarter than President Nixon and that he would destroy certain records so that the government could not get them. The attorney-client privilege does not protect disclosure of plans for future illegal activity. *In re Grand Jury Investigation*, 631 F.2d 17, 19 (3d Cir. 1980), *cert. denied*, 449 U.S. 1083 (1981); *see also In re September 1975 Grand Jury Term*, 542 F.2d 734, 737 (10th Cir. 1976). McBridee's testimony was properly admitted.

XVI

During the second trial a program titled "The Oil Game" appeared on television. Defendant claims that the trial court refused his request to determine whether any jurors had seen the program. This claim is baseless. The trial judge asked the jurors whether any of them had seen a show that bore directly or indirectly on defendant's trial. None had. Defense counsel had previously stated that a general inquiry would be sufficient, and defense counsel did not object to the court's inquiry.

After the trial the trial court learned that one of the jurors had received telephone calls about defendant during the trial. The judge questioned the juror and found that the juror's maid claimed to have answered the phone several times one day during trial and heard a voice whisper, "Sutton, Sutton." The juror stated that the maid's report had not affected her deliberations. The trial court refused defense counsel's request to call the other jurors back to question them. "The district court . . . is endowed with considerable discretion in determining the scope and nature of the investigation needed to evaluate the effect of an impermissible jury contact." *United States v. Almonte*, 594 F.2d 261, 266 (1st Cir. 1979). The trial court did not abuse its discretion in refusing to call back other jurors because of this minor incident.

XVII

Defendant argues that the government produced insuffi-

cient evidence to support his conviction for obstruction of justice because Simon could not identify the box introduced into evidence as the box he picked up at Johnson's house. Simon's identification was not necessary to support a conviction. There was sufficient evidence in the second trial, as in the first trial, from which the jury could reasonably infer that the box introduced at trial was the same box Simon picked up.

XVIII

Defendant claims that the trial court erred in refusing to give defendants proposed instructions on the credibility of various witnesses. The trial court's general instructions concerning impeachment and credibility adequately explained the effect of impeachment testimony. *See Devine v. United States*, 403 F.2d 93, 95-96 (10th Cir. 1968), *cert. denied*, 394 U.S. 1003 (1969).

AFFIRMED.

APPENDIX B

MAY TERM — JUNE 4, 1984

Before Honorable Oliver Seth, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Circuit Judges, and Honorable Hatfield Chilson, United States District Judge*

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
vs.	)	No. 82-1841
	)	
ROBERT B. SUTTON,	)	
	)	
Defendant-Appellant.	)	

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing en banc in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision sought to be reheard.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

/s/ HOWARD K. PHILLIPS, CLERK

* Of the United States District Court for the District of Colorado, sitting by designation.

APPENDIX C — PART I

EXCERPTS FROM FEBRUARY 1, 1980 CONVERSATION BETWEEN MARCELLO AND HIS ATTORNEY BARRY MOUTON

QUOTES FROM CONVERSATION BETWEEN BARRY MOUTON AND CARLOS MARCELLO DATED FEBRUARY 1, 1980, AT 8:51 A.M. to 5:14 P.M. TAKEN AT 1201 AIRLINE HIGHWAY, METAIRIE, LOUISIANA.

BARRY MOUTON: And uh . . . the only . . . that's why when I, when I read Sutton's name, I was wondering if maybe that had something . . .

CARLOS MARCELLO: Yeah, that's that . . . that . . . that's what I'm . . . **but I'm scared to fuck with him,** cause that's too dangerous to me. But look to me, **I don't wanta get implicated,** ya know what I mean?

* * *

CARLOS MARCELLO: They go . . . they had the records, all the records there. So I could give a fuck what these (inaudible). Did you ever meet Bob Sutton?

BARRY MOUTON: (Inaudible)

CARLOS MARCELLO: He's . . .

BARRY MOUTON: Fast talkin'.

CARLOS MARCELLO: Yeah, he's a fast talker, you see, I just met him three or four times and he want to fly over here today. I told him I . . . busy, man, I'll meet you in Lafayette, I figure you know . . . I'll meet you, that least I can talk, you know?

BARRY MOUTON: Uh-huh.

CARLOS MARCELLO: And uh, but he's a high powered motherfucker, he showed me a fuckin' time . . .

BARRY MOUTON: Oh, he got some juice, now.

CARLOS MARCELLO: He got, he, he showed me a financial statement for a hundred and sixty seven milion dollars. He ain't showed it to nobody, but he showed it to me. And I talked to you.

* * *

CARLOS MARCELLO: Now why, I can't get involved. If it was somebody I know, some of your friends, I say look, we'll see them people, man, they gonna get themself in trouble if they blackmail the man, you know, (inaudible), maybe we can make some money with 'em, you know? I don't know what this motherfucker, see, he don't tell me the whole story. Went in there and asked them for five million, I didn't give him no fuckin five million.

* * *

CARLOS MARCELLO: He asked me, he said do you know these guys? I said no, I don't know 'em. He said they're no good motherfuckers, they (inaudible). Said they, not (inaudible) motherfuckers, (inaudible). Me, **I ain't paid no attention.** Tell the truth, I made him put it in writin'. I'm sayin' the two names. Shit, **I don't want to get involved with no fuckin' FBI with** . . .

* * *

BARRY MOUTON: He scares me for one reason . . .

CARLOS MARCELLO: Ya understand?

BARRY MOUTON: . . . fuckin' mouth goes too much.

CARLOS MARCELLO: Yeah he go, he talk all the time.

BARRY MOUTON: All the time, all the time.

• • •

CARLOS MARCELLO: And he used to be a alcoholic, ya understand?

BARRY MOUTON: Oh, I didn't know that.

CARLOS MARCELLO: Oh, yeah. Now he drink nothin' but three iced teas. Donald drink too cause I won't let him drink when we're . . . we're drivin' so we had to take him to the plane, put him on the plane. But he's alright, he's **talkin' his ass off.** I just . . . **we just listened to him you know me,** I listen.

• • •

BARRY MOUTON: Something we can live with, you not gonna, you're not gonna make that fucker (inaudible) put some concrete shoes on 'em or something like that, I don't you know me, I don't operate like that, you don't either.

CARLOS MARCELLO: **I ain't helpin'.** Only thing could do, far as what you (inaudible), look, we got to talk to him just like we're talkin to another client. (Inaudible) What you want me to do, this . . .

• • •

CARLOS MARCELLO: Well no, you can do it that way or we'll do it, depend on what he tell you. It might mean nothin' it might be nothin' but uh, he say well, fuck, put it on a retainer fee. He claim he got some lawyers he give him eighty, eighty-five, hundred a month. You know that's talk. I figure if you can get eighty, look, if you can get five thousand a month . . .

BARRY MOUTON: Yeah, he'll get my attention.

CARLOS MARCELLO: That's what I mean.

BARRY MOUTON: He'll get my attention. But I, but I . . .

CARLOS MARCELLO: Ya see, he think (inaudible). He think that I can turn, turn anything upside-down. Now you got the whiff of it? Okay?

• • •

BARRY MOUTON: Well that's why I came, because the man come to see you . . .

CARLOS MARCELLO: He got, the guy said, I'm tellin' ya . . .

BARRY MOUTON: If he ain't worried about nothin', then he don't need nobody.

CARLOS MARCELLO: I'm tellin' ya. He, but he thinks that I can do this. **I ain't gonna do nothin' like that.** Ya understand, listen, look, somebody fuck with my wife or try to kill my kids or my brother, that's a different story. I'm gonna tell ya right now, that's a different story. It could be one of my (inaudible), it'd be a different story. I ain't gonna let 'em fuck with, with uh, for money and if he, if he might be fuckin' wrong. And you could say, man, hey, we, I try to be able to help you some way of somethin' you know. Yeah . . . You know, if it means just . . .

• • •

CARLOS MARCELLO: I'll tell you one thing. You know (inaudible) I believe, I tell ya too. **They could** (inaudible) **have a trap set for me.**

APPENDIX C — PART II

EXCERPTS FROM MARCELLO, NOLAND, WILLIAMS CONVERSATION OF FEBRUARY 1, 1980

ROBERT NOLAND: And they wanta put that deal through. But it's in B.P.M.'s name. This was, this was back eight months ago when I didn't have this idea. It's got to be in B.P.M. I can't go down there and call it NOLAN International, you know, or DICK WILLIAMS International.

DICK WILLIAMS: International.

ROBERT NOLAND: You can't.

DICK WILLIAMS: We don't have a name.

ROBERT NOLAND: You can't change names ta-to these people, they been, they been playin', you know, they been puttin' here, and B.P.M.'s doing, this and that. B.P.M. International's same company. They can accept that but you go down there and say okay, B.P.M., is no longer B.P.M., it's NOLAN International. Hey man, I can't do that. No (stutters) — nobody'll accept that. Where's your credibility, where's your — you know, where's all this. We got to have B.P.M.'s name.

DICK WILLIAMS: Financial (inaudible) his financial statement.

* * *

ROBERT NOLAND: Texas, so I'm sayin, I'm sayin' if I want control of the corporation, I don't have to have all the money, I don't have to have fifty-one percent of the money, I, I'm not gonna get in it for nothin'. But I'm leavin' his business, you know, I'm leavin', it's a matter of time, it's a matter of twenty, thirty days. And I'm gonna

— the only way I'm gonna leave him on good terms is, I can still make 'em money in international business, I don't want him askin' me well what are you doin' here, what are doin' that, cause what DICK and I are doin' is our business. And he talks to him. He can say oh DICK DICK's gonna sell oil with South Africa. He's down in Argentina. Who's he gonna tell that to, a banker? You know? We don't know. Mainly, it's none of his business. All he does is at the end of the month, or every six months, he gets his money.

CARLOS MARCELLO: That's right.

ROBERT NOLAND: This is somethin' that's gotta be had. And like you said, you gotta take it in and think about it.

CARLOS MARCELLO: I gotta take it in and like I say, I gotta get close to him than, than I am with him, you know? Cause I can't just go in to him and say look, man, why don't you listen? I can't tell him I met you. I got to see where I gotta meet you now with him. And then I'll say, well, maybe this, after talin' to BOB and DICK, man, you in trouble.

ROBERT NOLAND: See, what I'm thinkin' is maybe we can have a meeting he say okay.

CARLOS MARCELLO: Ya understand?

ROBERT NOLAND: Yeah.

CARLOS MARCELLO: Then I could say — well look —

ROBERT NOLAND: That's perfect.

CARLOS MARCELLO: BOB, BOB suggest that, I think his idea was great, man. And get out of this shit that you're

in. And pay, go ahead and pay the fine, what is ten million dollar if you're makin' - if you got a hundred and eighty million.

ROBERT NOLAND: (Inaudible)

CARLOS MARCELLO: Seven million (inaudible) me.

DICK WILLIAMS: And you get the heat off.

CARLOS MARCELLO: And look — let me tell ya. They ain't gonna let him alone now. He done open a fuckin' door.

DICK WILLIAMS: Yeah, that's right.

CARLOS MARCELLO: That twenty million ain't gonna keep —you watch, they gonna keep on him.

ROBERT NOLAND: But see, that's it, see? If you got that foreign corporation, if the D.O.E. keeps workin' (inaudible) they ain't donin' no business, it's gonna be harder for 'em. (Inaudible) you got records, well we're not doin' any business anymore. We don't have to have records. They said well we want to know.

DICK WILLIAMS: You're international.

CARLOS MARCELLO: Did you ever sit him down and talk to him?

ROBERT NOLAND: I can't do it, Carlos, because he thinks he thinks I'm playin' games. He thinks I'm tryin' to take over control.

CARLOS MARCELLO: Yeah.

ROBERT NOLAND: I am, but what I'm sayin' is maybe we can have a meeting, maybe Dick's there, you're there and

Bob's there. Nobody else. Not his son, nobody else, and we say, maybe Bennett or somethin', and we say Bob —

CARLOS MARCELLO: Realize, make him sit down and realize the real facts.

DICK WILLIAMS: Cause he's sweatin'.

CARLOS MARCELLO: And say look —

ROBERT NOLAND: Inaudible.

CARLOS MARCELLO: Why don't you —

DICK WILLIAMS: He's in a bind.

CARLOS MARCELLO: Why don't the shit you take off and let Bob (inaudible) run this thing?

ROBERT NOLAND: Well let me ask you somethin'.

CARLOS MARCELLO: Would he do that? You think he would do that?

DICK WILLIAMS: I think he would if he, if if it come from a source like you, Mr. Carlos (inaudible), respects you.

CARLOS MARCELLO: Well I know he respects me, I really believe he does, but he talks so much, I'm scared of the man, man.

ROBERT NOLAND: Well yeah but you —

CARLOS MARCELLO: He's talkin' about somethin' different altogether, makin' money now.

* * *

CARLOS MARCELLO: If you give 'em forty percent say.

ROBERT NOLAND: That's right. (Inaudible) forty-

CARLOS MARCELLO: Twenty, twenty, twenty, you know, you three are together, so you got (Inaudible) But look, this is what we told you, Bob, run the damn thing.

DICK WILLIAMS: Correct.

CARLOS MARCELLO: Cause we gonna make money or not. We either get out — or we gon-

DICK WILLIAMS: He's been after ninety thousand, he's goin' for ninety thousand barrels a day, a contract, not spots. You know, not a one-time deal for three years.

ROBERT NOLAND: Thirty-one dollars a barrel.

DICK WILLIAMS: That's a quarter of a million, a day, off right the top that we get. Right off the — I mean right off the top, a quarter of a million, easy. A sellin' by by workin' through an international deal. Every four days that's a million dollars.

ROBERT NOLAND: And you know, Dick and I got connection he don't, I don't want him knowin' who I'm dealin' with, I don't want him to know. I know people in the oil business good people, people that keep their slate clean. They wanta work with me but they don't wanta work with Bob. If I tell 'em okay, I got the same name but it ain't the same operation, he'll say okay, I wanta put some money in the deal, I wanta, I wanta send your man, whoever your man is, I wanted some of that Nigerian oil, I want some of that Equadorian oil. See, okay, you work with me. You don't talk to Mr. Sutton. He's not in control of (inaudible). So, we get more money, more investors, we we control it where he doesn't know who's investing.

• • •

ROBERT NOLAND: Well, then I'd lose the name of B.P.M. I lose that, I have to go through that whole procedure again. Dick had to go back over there.

And say, well we got, we got, we got—

DICK WILLIAMS: Another outfit.

ROBERT NOLAND: Yeah.

DICK WILLIAMS: Another company, man, forget that.

ROBERT NOLAND: Yeah and then —

DICK WILLIAMS: (Inaudible)

ROBERT NOLAND: That's right, and then they think, well, these people think yeah well —

DICK WILLIAMS: They playin' fuckin' games and —

ROBERT NOLAND: That's right.

DICK WILLIAMS: They pulled a humbug.

ROBERT NOLAND: And see like, like right now. We wrote this down. There's a refinery in uh . . .

DICK WILLIAMS: Florida, Tampa, Florida.

ROBERT NOLAND: . . . Tampa, Florida, twenty-eight thousand barrels a day. It doesn't have to, they wanta sell. All you gotta have is oil to put in it and you can pay for it in a year. Twent- it's a, it's a refinery for twenty-eight thousand barrels.

DICK WILLIAMS. But there's no products in, with Sutton's refinery.

ROBERT NOLAND: Oh yeah, better refinery, better location.

CARLOS MARCELLO: Well, how you gonna work up, how can we have a meetin' of the minds (inaudible) how, how you gonna bring it up in a few days?

ROBERT NOLAND: Okay.

CARLOS MARCELLO: It's gonna be hard to bring it up in a few days, man (inaudible).

• • •

CARLOS MARCELLO: Throw 'em off. (Inaudible) say look — Do you trust Bob? And I'll say yeah. All right you can tell me all about it. (Inaudible.) I say, well let him there. Bob will come up with some money or some — I'll, I'll work it up. It's hard for me to go runnin' to the man right now —

DICK WILLIAMS: No, no.

CARLOS MARCELLO: Say come in here tonight. I gotta see you.

ROBERT NOLAND: No.

CARLOS MARCELLO: You see right now, he's stuck. He's got the — IRS on him, he's got the deal in Tampa. He's got the deal in Lafayette, he got, he want — he want to do everything. He can't do a fuckin' thin'.

DICK WILLIAMS: Uh-huh.

CARLOS MARCELLO: He's tight. And he's all broke up like you said. If he ain't —

DICK WILLIAMS: Crazy.

CARLOS MARCELLO: Half as crazy, he gonna get crazy in the thirty days.

DICK WILLIAMS: That's right.

CARLOS MARCELLO: He — it's gonna make him crazy.

DICK WILLIAMS: In thirty days, he's —

CARLOS MARCELLO: And, and, the man, I know he had — he he had a fall one time drinkin' that right?

DICK WILLIAMS: I don't know.

CARLOS MARCELLO: Yeah, he said that in front of us.

DICK WILLIAMS: I don't know, Mr. Carlos.

CARLOS MARCELLO: So he could have fallen before — yeah he

DICK WILLIAMS: I don't recall that.

CARLOS MARCELLO: When I first met him he said man— I believe Joe Hagerman — no I think — he told me somethin'.

DICK WILLIAMS: He said that he had a drinkin' problem.

CARLOS MARCELLO: He had a drinkin' problem.

DICK WILLIAMS: And now his brother tells me he's on pill

CARLOS MARCELLO: Well, let me tell you somethin'

DICK WILLIAMS: His brother —

CARLOS MARCELLO: Let me tell you somethin'. I believe you might be right, cause I can tell a man —

ROBERT NOLAND: I had another guy tell me that.

CARLOS MARCELLO: I can tell a man, ya understand? I know what — what they're doin' and all. But that's beyond the point. Let's don't (inaudible)

ROBERT NOLAND: What I think, Carlos.

CARLOS MARCELLO: I think that — I think they gotta give me some time, I can't do it. I know what you're tryin'.

ROBERT NOLAND: No, no.

CARLOS MARCELLO: I got to work it out, you got . . .

ROBERT NOLAND: Sure.

CARLOS MARCELLO: . . . to back me up or Dick . . .

DICK WILLIAMS: Yeah.

CARLOS MARCELLO: . . . tell it to Dick and let Dick tell it to me. I can get it in Lafayette or after it comes here. But they'll come if I —

DICK WILLIAMS: If you brought it into here right now.

CARLOS MARCELLO: He'd be here tonight.

DICK WILLIAMS: That's right.

ROBERT NOLAND: Well —

CARLOS MARCELLO: And he said if you have something, he said would you call me. Give me his home number and everything — call me there, he's at the office, call me at my home anytime. Twelve o'clock, one o'clock, he'll fly down. Now that's how he talks to me.

DICK WILLIAMS: That's right.

CARLOS MARCELLO: But — what — but if you go cold turkey —

DICK WILLIAMS: No, you can't. You can't do that.

CARLOS MARCELLO: You know I'm don't — I'm not an oil man, Dick and - - -

DICK WILLIAMS: No.

CARLOS MARCELLO: . . . I ain't gonna say.

ROBERT NOLAND: But Mr. Carlos —

CARLOS MARCELLO: Only thing got is you, and that's it.

• • •

ROBERT NOLAND: It's — see — car — Mr. Carlos, this situation after you call him down here I'm not even here. You say let — let Mr. Nolan run it, you been tellin' me that he does a good job.

CARLOS MARCELLO: Oh, he been tellin' me.

ROBERT NOLAND: Okay, since they —

CARLOS MARCELLO: He told me everything about you.

ROBERT NOLAND: So he'd call me in the office, he'd say Bob, I don't know if you'll like this, he said we're gonna get out of the domestic business and we're gonna go foreign. I said — I said huh?

CARLOS MARCELLO: Yeah, I like that.

ROBERT NOLAND: Yeah, I said, Mr. Carlos thinks it's a good idea? I said I'm with him man, because he — if

he checked with his people in Washington, they say, see, first of all, you don't keep pushin, you know . . .

• • •

CARLOS MARCELLO: And say look, can can this man get out of — then I can go tell Sutton.

DICK WILLIAMS: Wait.

CARLOS MARCELLO: And say see, Sutton, I got some information I ain't gonna tell you where it come — the best thing for you to do, go do this, this, this and that there.

ROBERT NOLAND: That's right.

CARLOS MARCELLO: I say you told me you got a good man, we got Bob, we got Dick Williams. I say I trust Dick Williams with my life. Now, now you got Bob, let's put 'em both together and let 'em go on about their business. We get (inaudible) know what I mean? Or, give 'em stock or whatever you want to do. You know, you just do it the right way.

DICK WILLIAMS: Why sure, you don't wanta, you don't wanta (inaudible) a thing.

CARLOS MARCELLO: But you know what? Get your ass and got to Bahamas, stay there.

ROBERT NOLAND: Right.

CARLOS MARCELLO: Get away from here.

ROBERT NOLAND: Right.

CARLOS MARCELLO: You're out of sight, out of mind.

DICK WILLIAMS: That's exactly right.

CARLOS MARCELLO: See, he gonna stay away from there, Lafayette, he gonna stay away from (inaudible), we gonna get in serious fuckin' trouble.

ROBERT NOLAND: That's right.

CARLOS MARCELLO: You listen, I'm tellin' ya.

ROBERT NOLAND: You —

CARLOS MARCELLO: He told me with his own mouth, that he went before these lawyers, whatever they are, of the F.B.I.

ROBERT NOLAND: For the F.B.I.

CARLOS MARCELLO: He had told me the F.B.I.

DICK WILLIAMS: He told me (inaudible) man —

CARLOS MARCELLO: Hey, I'm gonna tell ya —

DICK WILLIAMS: (Inaudible).

CARLOS MARCELLO: You tell a man, and they say they black mailin' me. Told me that.

DICK WILLIAMS: For five million.

CARLOS MARCELLO: I got shook. I got shook.

DICK WILLIAMS: Remember? Five million?

CARLOS MARCELLO: I got shook, man. I said what does this bastard do? I tell ya (inaudible) I don't know what it's all about

DICK WILLIAMS: I don't know either.

CARLOS MARCELLO: And he — he (unintelligible) round and round, he say you don't know what (unintelligible) you don't know what, how to take it (unintelligible).

DICK WILLIAMS: That's right.

CARLOS MARCELLO: He's tellin' me before this (unintelligible). Well, what are you tryin' to do? If you go to the F.B.I., you tryin' to expose them there that blackmailin' you? The son of a bitch blackmailin' you? The son of a bitch blackmail me, they'll get a different story. I know how I'd take it. I'd take it different.

DICK WILLIAMS: Yes, sir:

CARLOS MARCELLO: But, look like — I don't know what they (unintelligible). How could they be blackmailin', that's what he's sayin'. I don't know.

DICK WILLIAMS: They gonna turn the records over.

CARLOS MARCELLO: Let me tell you somethin'.

ROBERT NOLAND: (unintelligible).

CARLOS MARCELLO: Let me tell you. If you blackmail me, you better know what the fuck you're doin', or you gonna end up gettin' killed or you gonna end up in jail the rest of your fuckin' life. They gotta be crazy. Either, he's crazy or these fellas gettin' him up. Or, call and tell 'em look, you don't have that —

DICK WILLIAMS: Five million.

CARLOS MARCELLO: Can't understand that. Five million is a lot of cash, man.

ROBERT NOLAND: Well, the thing about the see, if he quits his domestic operation, those those those those

(unintelligible) decrease in value about two to one. Because they're gonna try to pin him for what he's doin' now by provin' what he did in the past. If he gets out and he starts feelin' some good, it's not unusual for a company to concen'rate on foreign business. He's still got (unintelligible) refinery there, they can swap a little oil, you know, honestly. Put it in a refinery and run it. And swap a little oil, he's got his brother, he's got that (unintelligible) down there in Houston, he can do a few essential things.

CARLOS MARCELLO: We gotta think about how to get to him, TOM. Let me go take a leak.

ROBERT NOLAND: Okay, See —

CARLOS MARCELLO: I think how we gotta get —

ROBERT NOLAND: Move it?

DICK WILLIAMS: (unintelligible).

CARLOS MARCELLO: (unintelligible).

DICK WILLIAMS:

CARLOS MARCELLO: After you talk to him say look, this is how he's talkin'.

DICK WILLIAMS: Um huh.

ROBERT NOLAND: Let me tell ya. That's a good point because, if you —

CARLOS MARCELLO: You see, if I had y'all there with me, I can't talk like I want.

DICK WILLIAMS: I know that.

CARLOS MARCELLO: See, I can tell it so far, you — look —

ROBERT NOLAND: (unintelligible)

CARLOS MARCELLO: You on the fuckin' —

DICK WILLIAMS: You on the borderline.

CARLOS MARCELLO: You on the borderline and you gonna fall right in there, I'm gonna tell you right now.

DICK WILLIAMS: You try and fight 'em you gonna fall in it, cause they gonna, they (unintelligible).

CARLOS MARCELLO: What is what is your trouble? See, he never did tell me about (unintelligible). He just told me they want to plead guilty and go to jail, and this and that there. This is how he mentioned it to me. But you see, he don't never sit down and, and explain.

DICK WILLIAMS: No.

ROBERT NOLAND: Well, (unintelligible)

CARLOS MARCELLO: (unintelligible) that's he's talkin' about women, man, and this and that there. Now, you don't bullshit — just like that might. I said, who you talkin'? He said, I said you been talkin' there for two hours (unintelligible).

ROBERT NOLAND: That's right. Because (unintelligible) his wife.

CARLOS MARCELLO: He come back and say, he say, all he told me, his wife, nervous breakdown and all that bullshit, I said what you come to? Nothin'.

DICK WILLIAMS: See, I was tryin' — I was tryin' to investigate that MARTIN deal for

ROBERT NOLAND: Well, you see, I got some house deals. But the thing about it is, see I'm supposed to leave for Equador, on the seventh. And that big deal's goin' down.

CARLOS MARCELLO: Well, why don't you go ahead on down there I'll fly to (unintelligible) Sunday. And I'll have DICK with me.

ROBERT NOLAND: Yeah, what I'm thinkin is —

CARLOS MARCELLO: (Unintelligible)

ROBERT NOLAND: Is that I'll eat with DICK tonight.

CARLOS MARCELLO: Yeah. (unintelligible) back there.

ROBERT NOLAND: But see, if I'm gone, and you have this meeting, then he knows that I didn't have any part of it.

CARLOS MARCELLO: That's a good idea.

ROBERT NOLAND: If I'm in Equador, man —

CARLOS MARCELLO: That's a good idea.

ROBERT NOLAND: DICK calls me down there and let's me know, kinda where the thing . . .

CARLOS MARCELLO: Yeah . . .

ROBERT NOLAND: . . . is after a day or so, but I — I'm clean man —

CARLOS MARCELLO: That's good.

ROBERT NOLAND: I'm down there workin' hard see?

APPENDIX C — PART III

EXCERPTS FROM AGENT ZERINGUE PRETRIAL TESTIMONY RELATING TO GOVERNMENT EXHIBIT 18, INTRODUCED AT THE APRIL 1-6 PRETRIAL MOTION HEARING. THERE WAS NO TRANSCRIPT MADE OF GOVERNMENT EXHIBIT 18.

Q. Do you know there are special rules that relate, within the Department of Justice itself even, that relate to this particular statute?

A. Well, I am not familiar with the Department's rules —

Q. Probably not.

A. — but I believe that there are.

Q. Okay. But anyway this is kind of the highest level because you incorporate all of these other crimes in it, do you not?

A. Some crimes that would qualify to be used in RICO.

Q. And it carries a much stiffer penalty?

A. Yes, sir.

Q. And forfeiture?

A. Yes, sir.

Q. Now, Agent Zeringue, have you ever really listened to the Noland-Marcello tape on February 1 completely?

A. Yes, sir.

Q. All right when you listened to it — we had quite a bit of cross-examination yesterday — did you understand the relationship between the Mouton-Marcello tape about the deal and

the Marcello-Noland conversation later about him doing things for them when you first listened to those tapes or was that first brought to your attention yesterday?

A. Are you talking about the deal, the Nigerian deal?

Q. No, I am talking about Mr. Marcello talking Mr. Sutton into the offshore oil business.

A. Yes.

Q. You knew that relationship?

A. Uh-huh.

Q. You recognized that when Mr. Marcello was referring at the end of this particular tape to this guy coming to see him that he was going to give him a piece of some deal, you realized that he was talking about Bob Noland?

A. Yes, sir.

Q. You knew this then when you went to the grand jury?

A. Yes, sir.

Q. Now you played another tape the other day of February 6 between Mr. Marcello and Mr. Mouton, a telephone conversation, is that correct?

A. That is correct.

Q. Had you ever listened to that tape before?

A. I don't recall listening to that.

Q. As a matter of fact you were very surprised when you heard it, were you not?

A. Not as surprised as you seemed to be, but I had not heard it before.

Q. And utilizing that tape you had looked at the log of the conversation had you not?

A. That is correct.

Q. And nowhere on there does it appear that he talked about Mr. Mouton being his lawyer or getting a fee, did it?

A. It didn't say anything about a lawyer, no sir, about Mr. Mouton being a lawyer, no, sir.

Q. No, about him being Mr. Sutton's lawyer or becoming Mr. Sutton's lawyer?

A. No, it didn't.

Q. So you didn't realize before you played that tape that that would come out in this court, did you?

A. No.

Q. All right. Now I am going to ask a question of you, Mr. Zeringue, that I tell my students in moot court never to ask but I am going to ask you this. After listening in the context of yesterday in listening to the Noland tape, listening to this tape of Mr. Mouton at the end about maybe being his lawyer, listening to the full context of this tape today, would you not say, sir, that it was possible that Mr. Marcello was just playing along with Mr. Sutton for other reasons than to help him in his conspiracy? Not whether that's your opinion as a prosecutor, but would you not say that's possible based on these things?

A. It's a possibility.

Q. But the grand jury was never given a chance to review these, was it?

A. No, sir.